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Court U.S.
FILED
JUN 30 1994
OFFICE OF THE CLERK

No. 93-1925

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

ROBERT J. MUSEMECHE,
Petitioner,

v.

CHARTER NATIONAL BANK-WESTHEIMER,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a Texas statute that suspends the running of the applicable statute of limitations during a defendant's absence from the State of Texas denies equal protection to a defendant who is a non-resident of Texas, despite the decision in *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982).

2. Whether a Texas statute that suspends the running of the applicable statute of limitations during a defendant's absence from the State of Texas violates the Privileges and Immunities Clause, despite the decision in *Chemung Canal Bank v. Lowery*, 93 U.S. 76 (1876).

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TO THE HONORABLE SUPREME COURT:

Respondent Charter National Bank-Westheimer ("Charter") requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Charter generally agrees with the procedural history and statement of facts set forth by Petitioner with the following exceptions. First, Charter did not originally know where Mr. Musemeche could be found when he moved out of Texas. A demand letter was sent to Mr. Musemeche at his Texas address in 1985. Tr. 2 at 53; Plt. Ex. 11. When

Mr. Musemeche left Texas in 1986, he did not inform Charter of his new address. Tr. 2 at 80. When Charter decided to file suit, it originally could not locate Mr. Musemeche and had to take additional efforts to find him. Tr. 2 at 24-25.

Second, the parties stipulated that the suit was not filed until October 9, 1984, but Charter did not stipulate that the suit was filed "beyond the applicable limitations period." *See* Petition at 3. Suit was filed within the limitations period as extended by Tex. Civ. Prac. & Rem. Code § 16.063 (Vernon 1986).

Third, Mr. Musemeche asserted a defense of laches at trial based upon the fact that the suit was not filed until October of 1989. This defense was rejected by the trial court and that ruling was affirmed by the Fifth Circuit Court of Appeals.

ARGUMENT

A. Summary of Argument

The constitutional challenges asserted by Petitioner have been rejected by prior decisions of this Court and other courts. Tolling statutes bear a rational relationship to a legitimate state objective and do not violate the Equal Protection Clause. *G. D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982); *Vaughn v. Deitz*, 430 S.W.2d 47 (Tex. 1968). For the same reasons, such statutes do not violate the Privileges and Immunities Clause. *Chemung Canal Bank v. Lowery*, 93 U.S. 76 (1876); *Vostack v. Axt*, 510 F. Supp. 217 (S.D. Ohio 1981). Mr. Musemeche did not raise a Commerce Clause challenge to the Texas statute in the trial court or in the court of appeals, so his reliance upon Commerce Clause cases in support of his other constitutional challenges is misplaced.

B. Reasons For Denying The Writ

1. The Texas Tolling Statute Does Not Deny Equal Protection

In *G. D. Searle & Co. v. Cohn*, 454 U.S. 404 (1982), this Court held that a New Jersey tolling statute substantially similar to the Texas statute at issue in this case did not deny equal protection of the law. This Court recognized that tolling statutes are based on a "reasonable assumption" that, as a general rule, a defendant who is not located in the forum state may not be as easy to find or serve as a defendant who can be found in the forum state. 454 U.S. at 410. The Texas Supreme Court rejected an equal protection challenge to the Texas tolling statute in *Vaughn v. Deitz*, 430 S.W.2d 47 (1986).[1] In *Vaughn*, the Texas Supreme Court recognized that "[a]bsence from the state is not an unreasonable or arbitrary basis of classification where the statutes of limitations are concerned" because "distance is one of the factors that may make it more difficult and expensive to obtain" the information necessary to obtain service on an out-of-state defendant. 430 S.W.2d 490.

Further, Petitioner's entire argument is premised on a basic misunderstanding of § 16.063. Petitioner bases his challenge on his allegation that the Texas tolling statute applies to "nonresidents only." Petition at 6. However, the Texas statute tolls limitations based on the "absence from [Texas] of a person against whom a cause of action may be obtained." Therefore, by its express terms, the Texas statute applies equally to residents and nonresidents.

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[1] The *Vaughn* decision dealt with Tex. Rev. Civ. Stat. Ann. art. 5537, which is now codified as Tex. Civ. Prac. & Rem. Code § 16.063.

Petitioner makes the unsupported argument that the evolution of minimum contacts analysis under the Due Process Clause has made all tolling statutes "void as moot." Petition at 6. This is nothing more than an attack on the social policies underlying tolling statutes, which is an argument that is properly a matter of legislative debate, not judicial decision. Petitioner's only authority for his mootness argument is the decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). However, in *Searle* (decided thirty-seven years after *Int'l Shoe*), this Court held that tolling statutes retained a rational relationship to a legitimate state objective despite improvements in substituted service and broader concepts of *in personam* jurisdiction. 455 U.S. at 409-412. *See also Vaughn*, 430 S.W.2d at 488, 490 (availability of substituted service of process does not deprive tolling statute of rational basis).

Finally, Petitioner relies heavily on the decision in *Bendix Autolite Co. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). *Bendix* involved a Commerce Clause challenge to an Ohio tolling statute, but Petitioner has never attacked the Texas tolling statute on Commerce Clause grounds. *Bendix* itself reaffirmed the equal protection holding in *Searle*. 486 U.S. at 893, 894. Moveover, the Ohio statute struck down in *Bendix* on the basis of the Commerce Clause did not merely toll limitations but also required an out-of-state corporation to designate an agent for service of process in Ohio in order to gain the protections of the statute of limitations. The designation of an agent operated as a consent to the general jurisdiction of the Ohio courts over any claim involving the corporation, including "matters to which Ohio's tenuous relation would not otherwise extend." 486 U.S. at 893. This forced submission to general jurisdiction was held to be a "significant" burden on interstate commerce that invalidated

the entire statute. 486 U.S. at 891. The Texas tolling statute has no comparable provision.

2. The Texas Tolling Statute Does Not Violate the Privileges And Immunities Clause.

The claim by Petitioner that tolling statutes such as § 16.063 violate the Privileges and Immunities Clause[2] has been rejected for more than 100 years. *Chemung Canal Bank v. Lowery*, 93 U.S. 76, 23 L. Ed. 806 (1876). *See also Vostack v. Axt*, 510 F. Supp. 217, 221-223 (S.D. Ohio 1981); *Commonwealth of Pennsylvania v. Lightman*, 489 A.2d 200 (Pa. 1985), *cert. denied*, 475 U.S. 1095 (1986); *Dew v. Applebury*, 153 Cal.Rptr. 219, 222-224 (Calif. 1979)(in bank).

Moreover, the Texas tolling statute treats Texas residents and non-residents equally. The statute applies to any person absent from Texas against whom a cause of action may be maintained, whether he is a resident or not. The Texas tolling statute is premised on the same legislative determination that has been recognized in all of the cases holding that tolling statutes do not violate the Privileges and Immunities Clause: it may be more difficult to serve defendants who cannot be found in the forum state even when substituted service is available, and this distinction is sufficient to allow tolling statutes to satisfy constitutional requirements.

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[2] Petitioner's argument is couched in terms of a right to travel. The Fourteenth Amendment Privileges and Immunities Clause does not create an independent right of travel. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77-78, 21 L. Ed. 394 (1870); *Lutz v. City of York*, 899 F.2d 255, 263-64 (3rd Cir. 1990). The right to travel therefore must arise from the Privileges and Immunities Clause of article IV, § 2.

CONCLUSION

The Petition for Writ of Certiorari presents no issues worthy of review by this Court. The decisions in *Searle* and *Vaughn* have resolved Petitioner's equal protection challenge to the Texas tolling statute, and the decision in *Chemung Canal Bank* has foreclosed his privileges and immunities challenge. Petitioner has never raised a Commerce Clause challenge to the Texas tolling statute. The Petition for Writ of Certiorari should be denied and Respondent should be granted such other and further relief to which it is justly entitled.

Respectfully submitted,

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